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December 4, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW.
Washington, DC 20551

RE: R-1366. Proposed Rule on Closed-End Lending.

Dear Ms. Johnson:

On behalf of the National Association of Federal Credit Unions (NAFCU), the only trade association that exclusively represents the interests of our nation's federal credit unions (FCUs), I am responding to the Federal Reserve Board's proposed rule to implement new changes regarding closed-end lending secured by real estate. NAFCU understands that certain reforms are needed in the mortgage market and we support clarifying the mortgage process for consumers as much as possible. Nonetheless, the association is concerned with certain portions of the proposed rule as we believe they may have unintended consequences which would ultimately be detrimental to consumers.

Finance Charge

NAFCU agrees with the Board that the myriad exclusions in the current definition of the "finance charge" are problematic. NAFCU is concerned that the proposal includes fees in the finance charge that are not truly a cost of credit. Nonetheless, we applaud the Board's effort to simplify the process for determining what constitutes a finance charge and what does not. With that in mind, NAFCU has two primary concerns regarding the fees that are ultimately included in the finance charge. First, in order to ensure that unscrupulous lenders do not take advantage of any vagueness within the regulation, we encourage the Board to be as clear as possible regarding exactly what fees should be included in the finance charge. Second, the finance charge should only include fees that the lender can reasonably be expected to know.

The final test for whether a fee is a finance charge should be as specific as possible. Under the proposal, a fee is a finance charge if it (1) is payable "directly or indirectly by the consumer" and (2) is "imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit." Additionally, the proposal provides a list of items that should be included in the finance charge as well as items that should not be part of the finance charge.

NAFCU is generally supportive of the test and we appreciate that the Board provided an exception for insurance products where the product is not required by the lender. Our members' primary concern is merely that the Board be as specific as possible in listing which fees should be included and which fees should be excluded. We understand that specificity is difficult as the type and the mere name given a particular fee may vary greatly from one lender to the next. Nonetheless, we would encourage the Board to consider providing greater guidance regarding exactly what fees should and should not be included.

The more troubling concern with the new definition of finance charge is that it essentially requires lenders to disclose fees which may be levied by a third party. The rule specifically requires fees for closing agents to be included as part of the finance charge. This, however, is problematic as the lender likely has little control over the fees charged by the closing agent. Certainly, lenders can provide an estimate of the closing fees. However, it would be virtually impossible to include anything more than an estimate on the disclosures that must be provided within three days of application. Further, there will certainly be at least some situations where it will be impossible for the lender to provide an accurate figure for closing fees on the disclosures that must be provided three days before closing. Consequently, the closing date will need to be postponed until the lender can get final figures from the settlement agent.

Additionally, NAFCU does not believe taxes should be included in the finance charge. Taxes are not imposed or retained by the creditor. Taxes are levied by the municipality and as such, should not be included in the finance charge, which is supposed to reflect the cost of credit. Further, in many situations the total tax due would be difficult to determine until just before closing. This, in and of itself is not problematic; however, when coupled with the absolute requirement for three days between the final disclosures and closing, including taxes in the APR would only complicate an already complex transaction.

In general, NAFCU supports the Board's attempt to better define the finance charge. Nonetheless, more thought should be given to the practical implications that the lender often will find it impossible, despite its best efforts, to accurately disclose fees assessed by third parties. Further, as discussed in more detail below, the new requirements regarding disclosure of third party fees may be particularly burdensome when coupled with new redisclosure requirements that must be made if certain terms change beyond an acceptable threshold.

Disclosures

NAFCU understands the Board's concerns regarding disclosure of material terms of the loan. However, NAFCU is concerned that the added disclosures included in this proposal would provide little real benefit. At the same time, the proposal would result in fundamental, wholesale changes to the existing disclosure framework. New disclosures are required, existing disclosures would undergo major modifications and new waiting periods would be implemented. Lenders would need to make comprehensive changes to their lending programs and their disclosure and compliance systems. Employees would need comprehensive new training and core processing and software systems would likely require extensive updates. With all these changes in mind, not to mention significant other changes to Regulation Z, NAFCU believes that any implementation period should provide considerable time for lenders to acclimate. Furthermore, as a general matter, NAFCU believes the purposes behind the Truth in Lending Act (TILA) and Regulation Z may be better affected by requiring less, rather than more, disclosure. However counterintuitive that may seem to some, it is our members' experience that borrowers often do not read the voluminous disclosures required by Regulation Z and the Real Estate Settlement Procedures Act (RESPA). Consequently, NAFCU would recommend that the Board consider a general reexamination of the numerous new disclosure requirements envisioned by this proposal.

Disclosures within Three Days of Application

NAFCU encourages the Board to reconsider the proposal that lenders provide a new graph with the TILA early disclosures. Under the proposal, lenders would be required to provide borrowers with a graph detailing the APR for borrowers with excellent credit as well as the APR for borrowers with impaired credit. It is our experience that the vast majority of home buyers already understand the importance of their credit score and the impact that their score has on the cost of credit. The requirement would be burdensome and would add new costs for lenders as they would likely have to purchase a new software product capable of pulling the figures for prime loans and higher priced loans from a data base for conversion to a graph. While NAFCU appreciates that this information may be useful in some limited number of instances, the benefits do not outweigh the costs required of lenders to implement such a system. Further, given that many consumers already do not read all of the disclosures required under TILA and RESPA, NAFCU is skeptical that adding still more disclosures will produce any tangible benefit.

Disclosures Three Days before Closing

NAFCU is extremely troubled by the proposal to require at least three days between when the consumer receives the TILA final disclosures and closing. NAFCU understands the very legitimate concerns with lenders who surprise borrowers at closing with new fees and charges. Nonetheless, the proposal to eliminate the exception for bona fide financial emergencies and require an absolute three day waiting period is a cure worse than the problem. The vast majority of real estate contracts require buyers to put down "earnest money" which the seller can keep if the sale is not closed by a date agreed upon by both parties. The absolute three day requirement between the final disclosures and closing will undoubtedly cause severe problems when the contract date for closing falls during the mandatory three day waiting period. While we understand the Board's attempt to protect borrowers from surprise costs at closing, such an inflexible rule simply exchanges one potential bad result for another. Granted, lenders can no longer pressure borrowers in to accepting new fees at the last minute. However, borrowers, otherwise completely willing and able to close the sale, will be put at the mercy of sellers who have the contractual right to walk away from the transaction and keep the earnest money.

The problems detailed above are compounded by the fact that the proposal would require the final TILA disclosures to include fees that the lender itself has no control over, such as closing fees and, potentially, taxes. However, well intended, the strict three day waiting period will undoubtedly cause major problems for potential buyers even in cases where there is no tangible benefit. What's more, assuming a borrower does lose a deposit because the contract date to close expired during the three day waiting period after TILA final disclosures, that borrower will almost certainly attempt to sue the lender, closing company or any other entity that he or she believes is responsible for the delay. This well intended rule will cause more problems than it solves and it will undoubtedly lead to increased litigation. In closing, NAFCU strongly recommends that the final proposal allow an exception to the three day requirement for in certain situations. For example, the Board could retain the existing exemption for bona fide financial emergencies and clarify that loss of earnest money would qualify for the exemption. While the loss of earnest money is the most pressing concern, NAFCU would also recommend that any exemption allow the consumer to waive the three day waiting period if the three day period would lead to any other problems with the sales contract.

Redisclosure Requirements

NAFCU supports the second proposed alternative for redisclosure requirements. The Board's proposal included two alternative options. The first would require redisclosure of the final TILA notice if there was any change in terms to the loan. The second alternative requires redisclosure only if the final APR exceeds a certain minimum tolerance or if an adjustable rate feature is added. NAFCU strongly supports the second alternative. As discussed above, we believe the strict three day waiting period between final disclosures and closing is unnecessary. Requiring a further three day delay in the event of any change in terms would only exacerbate the potential problems created by the proposal.

The disclosed finance charge would be treated as accurate if the variance is less than $100. As stated above, NAFCU strongly recommends eliminating the three day waiting period where there is a bona fide financial emergency. However, should the Board determine not to include such an exception, NAFCU urges the Board to alternatively consider increasing the allowable variance. Again, given that the proposal would require the lender to include charges from third parties over which the borrower has no control, a $100 variance seems exceptionally low.

NAFCU appreciates this opportunity to share its comments on the proposed revisions to Regulation Z. Should you have any questions or require additional information please call me at (703) 842-2212.

Sincerely,

Dillon Shea

Dillon Shea
Associate Director of Regulatory Affairs